

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 73.606(b)  
Table of Allotments  
TV Broadcast Stations  
(Pueblo, Colorado)

) MM Docket No. 93-191  
) RM 8088  
)  
)

To: The Commission

COMMENTS OF KKTU, INC.

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## SUMMARY

KKTV, Inc. ("KKTV"), submits its Comments in this proceeding to oppose the adoption of the Notice of Proposed Rulemaking ("NPRM") released by the Commission in this proceeding. MM Docket No. 93-191, released July 13, 1993.

In the NPRM, the Commission concluded that, in general, the channel swap might serve the public interest. However, the Commission noted that:

1. It does not appear that allowing the USC Channel \*8 construction permit to be assigned to SCC would be in the public interest; NPRM at ¶ 7;

2. The decision by USC to use a translator to provide improved service to Colorado Springs, rather than the outstanding construction permit, does not appear to be in the public interest; NPRM at ¶ 8; and

3. The proposal by USC to provide additional service through expansion of its translator network appears to be too speculative to constitute the basis for a public interest finding in support of the proposed channel exchange. NPRM at ¶ 9.

KKTV submits these Comments to express its general support for the Commission's initial determinations concerning the above-described lack of public interest benefits in the proposed channel exchange. However, KKTV submits that the lack of public interest benefits of the proposed channel exchange is such that the channel exchange should not be permitted at all, and the rulemaking proceeding should be terminated without a grant of the requested

channel exchange. In support of this conclusion, KKTV submits that, in addition to the points identified above by the Commission, the channel exchange should be denied because:

1. There will be a loss of first off-air primary commercial service to 2,216 persons, while there be will a gain of first off-air primary noncommercial service to only 2,906 persons;

2. The information on alleged service gains to be provided by translators is too incomplete, undocumented and speculative to be given any consideration in this proceeding, and

3. Many of the persons who purportedly will receive first noncommercial service via translator already receive noncommercial service on cable.

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To: The Commission

COMMENTS OF KKTV, INC.

KKTV, Inc. ("KKTV"), by its attorneys and pursuant to Sections 1.415 and 1.420 of the Commission's Rules, hereby submits its Comments in the above-captioned rulemaking proceeding. For the reasons set forth herein, KKTV submits that the proposed amendment to the Television Table of Allotments is not in the public interest and should not be adopted. In support of its Comments, KKTV submits the following:

I. BACKGROUND

1. On July 13, 1993, the Commission issued the above captioned Notice of Proposed Rulemaking ("NPRM"). The NPRM was issued in response to a "Petition for Issuance of Notice of Proposed Rulemaking to Exchange Channels" (the "Channel Swap Petition") filed jointly by the University of Southern Colorado ("USC"), licensee of noncommercial television station KTSC(TV), Channel \*8, Pueblo, Colorado, and Sangre de Cristo Communications, Inc. ("SCC"), licensee of commercial television station KOAA-TV, Channel 5, Pueblo, Colorado. In the Channel Swap Petition, USC and SCC requested the issuance of an NPRM which would allow the two stations to exchange channels, pursuant to Section 1.420(h) of the Commis-

sion's Rules.

2. In the Channel Swap Petition, as summarized by the Commission in the NPRM, USC and SCC proposed the following:

a. USC would provide Channel \*8 to SCC and Channel \*8 would be dereserved.

b. USC would assign to SCC the unbuilt construction permit which USC obtained for the asserted purpose of moving its transmitting facilities to a Cheyenne Mountain site which would allow it to better provide service to Colorado Springs.

b. SCC would provide Channel 5 to USC and Channel 5 would be reserved.

c. SCC would provide financial support to USC.

d. SCC would donate its translator station K30AA, Colorado Springs, Colorado, to USC.

e. SCC would donate the existing licensed facilities of station KOAA-TV to USC.

NPRM at ¶ 3.

3. USC and SCC have asserted in their Channel Swap Petition the following as public interest benefits which would allegedly flow from the proposed channel swap:

a. The existing transmitting facilities of KOAA-TV would provide a signal superior to the existing facilities of KTSC(TV).

b. The funds which would be provided to USC could be used to expand USC's existing translator network and allow USC to create additional noncommercial programming.

c. Expansion of USC's translator network allegedly would allow USC to provide first noncommercial educational reception service to approximately 83,000 new viewers in western Colorado, and a new reception service to 299,897 persons. However, the 299,897 persons would consist of a combination of additional persons within the proposed KTSC Grade B contour, persons within the service area of donated translator station K30AA, and persons served by new translator stations to be constructed from a portion of the funds to be provided by SCC.

d. The swap would allow KOAA-TV to obtain a long sought after site in Colorado Springs.

NPRM at ¶ 3.

4. The Commission reviewed the proposed channel swap and concluded that there were some elements of the proposal which suggested that such a channel swap might be in the public interest. The Commission stated that it would therefore issue an NPRM proposing to allow a channel swap. NPRM at ¶ 6. The Commission also stated that it has a number of concerns about the proposed channel swap. NPRM at ¶ 7.

5. First, the Commission stated that, because no facilities have been constructed or operated at the site for which USC holds a construction permit on Cheyenne Mountain, it was appropriate to propose modification of SCC's license authorization to operate at USC's currently licensed site on Baculite Mesa, at coordinates 38-22-25 and 104-33-27, rather than at the site specified in the USC construction permit, at coordinates 38-44-44 and 104-51-39. NPRM

at ¶ 7.

6. Second, the Commission stated that it was concerned that USC had been granted a waiver of Sections 73.610 and 73.685 of the Commission's Rules based upon USC's stated need to continue providing noncommercial educational television service to Colorado Springs "...without relying on a translator." NPRM at ¶ 8. The Commission noted that, according to the Channel Swap Petition, shadowing occurs in Colorado Springs from the KOAA-TV/KTSC(TV) licensed sites on Baculite Mesa. The Commission further noted that, contrary to USC's stated intent at the time it obtained the construction permit to move to Cheyenne Mountain, in the Channel Swap Petition USC now proposes to utilize a translator to provide service to the shadowed portions of Colorado Springs if it is allowed to exchange channels with KOAA-TV. The Commission concluded, "...we do not believe it is generally desirable to replace primary service to that community [Colorado Springs], as contemplated in connection with USC's waiver request, with a secondary service which could ultimately be forfeited to a full service television operation...." NPRM at ¶ 8. The Commission invited comments on this issue. Id.

7. The third area of concern raised by the Commission was that the vast majority of the alleged service gains shown by USC related solely to its proposed translator network expansion. The Commission stated that, "...since Commission policy is to treat translators as secondary services for purposes of spectrum priority, USC's projected translator expansion would not be



protected against the initiation of a full service facility." NPRM at ¶ 9. The Commission added:

Thus the projected population gains attributed to USC's proposed operation of translators at Grand Junction, Durango and Colorado Springs may be too speculative to be considered in the context of this rulemaking proceeding. Therefore, we may not consider these gains in conjunction with the overall benefits associated with this proposal.

NPRM at ¶ 9 (emphasis added).

## II. THE PROPOSED CHANNEL SWAP IS NOT IN THE PUBLIC INTEREST

8. The Commission specifically permits a commercial television station and a noncommercial television station to jointly petition the Commission for a rulemaking proceeding to amend the Television Table of Allotments to exchange channels. Section 1.420(h) of the Commission's Rules. Section 1.420(h) requires that the stations serve substantially the same market and that the Commission find that such an exchange will promote the public interest, convenience and necessity.

9. The Commission has identified additional factors which will be considered during the review of any such channel exchange proposal. Specifically, the Commission has stated that the parties to an exchange may benefit because the exchange will result in:

- a) More appropriate site or service area locations,
- b) Cost savings, or
- c) Financial advantages that permit them to improve quality of facilities or, in marginal cases, to institute broadcast operations where it would not otherwise be possible. In all such instances, the Commission concluded that the public could benefit from either new or improved commercial and noncommercial service.

Intraband Television Channel Exchanges, 59 RR2d 1455, 1461 (1986),  
recon. denied, 3 FCC Rcd 2517 (1988).

10. The Commission has further indicated that the extent to which a proposed channel exchange will result in gains or losses of service to viewers is a public interest factor. Id. 59 RR2d at 1465. A noncommercial station proposing to receive compensation as part of an exchange must also assure that proceeds are directed to activities related to the broadcast operations of the licensee. Id. 59 RR2d at 1464.

**A. The Proposed Channel Swap Will Not Improve Service**

11. The NPRM makes the observation that, under the proposed channel exchange, "[e]ach station could benefit by potentially improving the quality of their facilities, thus providing a public benefit by rendering new or improved commercial and noncommercial service." NPRM at ¶ 6. In fact, the evidence indicates that the NPRM is incorrect in this regard.

12. The public interest benefits of the proposed exchange for KTSC(TV) are, at best, extremely modest and are almost entirely offset by adverse effects in the form of the loss by 2,216 people of their only off-air primary commercial service. When the channel exchange under consideration in the rulemaking proceeding (an exchange where both licenses would specify antenna sites on Baculite Mesa at coordinates 38-22-25 and 104-33-27) is measured by the relevant criteria, it must be concluded that the proposed channel exchange simply is not in the public interest.

13. The proposed channel exchange and dereservation of Channel \*8 and the reservation of Channel 5 at coordinates 38-22-25 and 104-33-27 to accommodate the petitioners' proposal would not create dramatic improvements in the number of people receiving first off-air primary noncommercial television service, while causing almost an identical number of viewers to lose their only primary off-air commercial television service. Attached hereto as Exhibit A is the Technical Exhibit and Affidavit of Richard S. Graham, Jr. Exhibit A clearly establishes that, if the proposed channel swap were effectuated, a total of 2,906 viewers, scattered over 12 counties, would receive first off-air primary noncommercial service from KTSC(TV). Exhibit A at Exhibit #2. This minimal gain in noncommercial service is almost entirely offset by the loss by 2,216 people of their only off-air primary commercial service (KOAA-TV) if the proposed channel swap were effectuated with both stations continuing to broadcast from Baculite Mesa.<sup>1</sup> Exhibit A at Exhibit #4.

14. It therefore can be seen that the proposed channel swap will not have any significant net improvement in primary off-air television service. Thus, contrary to the suggestion in the NPRM

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<sup>1</sup> Because the NPRM proposes to modify SCC's authorization for Station KOAA-TV to specify the site on Baculite Mesa in USC's outstanding license for KTSC(TV) and not USC's construction permit site on Cheyenne Mountain, KKTv's Comments will not address the question of service gains and/or losses which would occur if the NPRM had proposed SCC's authorization for KOAA-TV to specify the construction permit site. If SCC and USC in their Comments attempt to resurrect consideration of SCC's proposed authorization to operate KOAA-TV on Channel 8 at the Cheyenne Mountain construction permit site, KKTv will address the public interest implications of such an authorization in its Reply Comments.

at ¶ 6, thousands of persons will be injured by the loss of their only off-air primary commercial television service.

15. The Commission has made it clear that "...once in operation a station has an obligation to maintain service to its viewing audience, and that the withdrawal or downgrading of service is justifiable only if offsetting factors associated with the proposal establish that the public interest will be benefitted." KTVO, Inc., 57 RR2d 648, 649 (1984). It recently has been reemphasized that any loss of service is "...prima facie inconsistent with the public interest." Coronado Communications, 8 FCC Rcd 159, 71 RR2d 1250, 1254 (Chief, Video Serv. Div. 1992).

16. The foregoing establishes that the proposed channel swap would result in a significant loss of existing first off-air primary commercial television service. Thus, the channel swap is *prima facie* not in the public interest. The asserted public interest benefits of the proposed channel swap clearly do not overcome this presumption.

17. The Channel Swap Petition also fails to provide important information regarding the service KTSC(TV) proposes to provide via translators -- a secondary service -- if the channel swap were approved. These omissions have left the impression that the gains in noncommercial television service which would result from the exchange are far greater than they would in fact be.

18. The Channel Swap Petition claims that, through the use of translators, KTSC(TV) will provide the "first educational service" to 82,871 persons on the western slope of Colorado. Exhibit 2 to

Channel Swap Petition at 1. This grand statement glosses over the facts that this proposed service is a secondary service and that many of these 82,871 persons already have access to educational television via cable.<sup>2</sup>

19. The NPRM itself recognizes that the proposed service to the western slope of Colorado is secondary service which could be lost at any time. NPRM at ¶ 9. In addition, the cable system in Grand Junction, Colorado (where USC proposes to build one of the two western slope KTSC(TV) translators) provides the signal of educational station KRMA-TV (Denver) to 23,529 subscribers, while the cable system in Durango (where USC proposes to build the other KTSC(TV) western slope translator) provides the signal of educational station KNME-TV (Albuquerque) to 4,481 subscribers. See excerpts from 1993 Cable & Television Factbook Cable Volume, attached hereto as Exhibit B, at D-206, D-211. Thus, the amount of this purported secondary "first educational service" which would in fact be the first availability of educational television service on the western slope clearly is substantially less than the 87,871 persons claimed by the Channel Swap Petition.

20. It also is worth noting that the Channel Swap Petition makes no claim that any of the persons in Colorado Springs who would receive KTSC(TV) via translator K30AA and who do not

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<sup>2</sup> Obviously cable service is not a substitute for off-air primary service. However, when the public interest benefits of a secondary translator service are being weighed, the fact that viewers already have educational television available via cable is not something that should be ignored. See, e.g., KTVO, Inc., 57 RR2d at 650, Coronado Communications Co., 71 RR2d at 1255.

presently receive KTSC(TV) would be persons who currently do not receive any off-air primary noncommercial television service. Thus, once again, any benefits from the proposed secondary noncommercial television service would, at best, be very marginal.

21. The foregoing facts and analysis establish that the channel swap proposed in the NPRM will not provide a public service benefit by rendering new or improved commercial and noncommercial service. Indeed, any improvements in noncommercial service are marginal at best and do not overcome the presumption that the significant loss of existing first off-air primary commercial service is not in the public interest. Therefore, the proposed channel swap must be rejected as not in the public interest.

**B. The Commission's Concerns Are Valid**

22. As described above, the NPRM also raises three very serious concerns on which comments were requested. NPRM at ¶¶ 7-9. The NPRM seeks comments on:

a) the NPRM's determination that SCC's authorization for operation on Channel 8 be at the site specified on USC's license for KTSC(TV) on Baculite Mesa and not at USC's construction permit site on Cheyenne Mountain (NPRM at ¶ 7),

b) the NPRM's determination that shadowing occurs in Colorado Springs from the KOAA/KTSC(TV) licensed site, which requires translator service in that portion of the KTSC(TV) service area, and the concern not to replace a primary service (as set forth in USC's construction permit) with a secondary service which could be forfeited (NPRM at ¶ 8), and

c) the NPRM's concern that purported gains in service for KTSC(TV), almost entirely related to the proposed operation of translators, are too speculative to be considered in the context of a rulemaking proceeding (NPRM at ¶ 9).

KKTV will address each of these concerns below.

1. **The NPRM Correctly Proposes To Modify SCC's Authorization For Station KOAA-TV To Specify The Site In USC's Outstanding License For KTSC(TV) And Not USC's Construction Permit Site**

23. The Channel Swap Petition proposed that, after the channel exchange, SCC would operate KOAA-TV on Channel 8 from the site on Cheyenne Mountain set forth in USC's construction permit. The NPRM concluded that it was appropriate to propose to modify SCC's authorization for Station KOAA-TV to specify the Baculite Mesa site in USC's outstanding license for KTSC(TV) and not its construction permit site on Cheyenne Mountain. NPRM at ¶ 7. This conclusion is correct for a number of reasons.

a. **The Construction Permit Was Erroneously Granted**

24. The construction permit for the KTSC(TV) facilities on Cheyenne Mountain was granted although USC failed to provide any information about the numbers of persons who would gain and lose service and the numbers who would gain and lose their only off-air primary noncommercial service if USC moved the KTSC(TV) antenna from Baculite Mesa to Cheyenne Mountain. Such information on gains and losses should have been provided to the Commission by USC. Indeed, as noted above, Commission policy requires that an operating station continue to provide service to its viewing audience. A proposal to withdraw service from a station's viewing

audience is *prima facie* inconsistent with the public interest and this presumption can only be overcome by a showing that offsetting factors establish that the public interest will be benefitted. KTVO, Inc., 57 RR2d at 649, Coronado Communications Co., 71 RR2d at 1254-1255.

25. The Mass Media Bureau, in granting the application for the construction permit, stated that "We further note that, while there would be some loss areas to the south and east of Pueblo, these areas are largely unpopulated." February 28, 1991 letter from Barbara A. Kreisman to Thomas Aube. Incredibly, there was no factual basis in the record for this determination that the loss areas are "largely unpopulated."

26. In their Channel Swap Petition USC and SCC for the first time provide some sketchy information about the population in these loss areas which would be created if the KTSC(TV) antenna were moved to Cheyenne Mountain. According to USC and SCC, the loss areas contain 19,599 persons. Exhibit 2 to Channel Swap Petition at Population Summary. The information with regard to the persons who would gain or lose first off-air primary noncommercial television service if the KTSC(TV) antenna were moved to the site set forth in the construction permit still has not been disclosed by either USC or SCC.

27. Therefore, the Mass Media Bureau lacked a factual basis for concluding that any loss of service which would result from the grant of USC's application for a construction permit was insignificant and ignored the clear Commission policy that any loss of



existing service is *prima facie* not in the public interest. Therefore, it was clear error for the Commission to have granted USC the construction permit. Under these circumstances, the Commission was correct in refusing to issue an NPRM permitting USC and SCC to take advantage of a construction permit which should never have been granted to USC in the first place in order to effectuate the dubious channel swap which they propose, which would give a commercial television station (KOAA-TV) the benefit of a short spacing waiver granted to a noncommercial station (KTSC(TV)).

**b. The Factual Basis for Granting the Construction Permit No Longer Exists**

28. The NPRM correctly notes that the allotment of Channel #8 at USC's construction permit site is short spaced to station KJCT(TV), Channel 8, Grand Junction, Colorado, and to vacant Channel 8 at Laramie, Wyoming.<sup>3</sup> NPRM at ¶ 7 n. 5. The NPRM also correctly points out that USC was granted a waiver of the minimum distance separation requirement for Station KTSC(TV) based in part on the need to provide public service television service to Colorado Springs without relying on a translator to accomplish the goal.<sup>4</sup> Id. The NPRM concluded that it was not appropriate to

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<sup>3</sup> USC and SCC have petitioned to deny the application for a construction permit for a noncommercial station filed by Central Wyoming College for Laramie, Wyoming, ironically on the basis that the proposed station in Laramie would be short spaced to the site specified in USC's construction permit. See, File No. BPET-921219KE.

<sup>4</sup> The letter granting the construction permit and the waiver of the Commission's minimum distance separation requirements specifically mentioned that the Commission was "...mindful of the unique role played by many noncommercial television stations in (continued...)

determine at the rulemaking stage whether a similar request for waiver of the spacing requirements from a commercial licensee would be granted at the application stage. Id.

29. The simple fact is that USC, by joining with SCC in the Channel Swap Petition, has made it clear that the factual basis on which the Commission relied in granting USC the construction permit will no longer exist if the channel swap is approved and consummated. Under these circumstances, the Commission was correct in refusing to propose that a commercial station, KOAA-TV, be allowed to reap the benefits of a waiver of the Commission's spacing requirements which was predicated on a noncommercial station's unique situation.

30. This conclusion is reinforced by SCC's questionable history of seeking waivers of the Commission's rules to increase KOAA-TV's coverage of Colorado Springs. On February 26, 1988, SCC filed a request with the Commission seeking to receive the assignment of the construction permit for unbuilt station KPCS(TV), Channel 32, another Pueblo station. SCC attempted to obtain a waiver of the Commission's "duopoly rule," Section 73.3555, to operate KPCS(TV) essentially as a full power translator for KOAA-TV, covering the Colorado Springs area, even though the station is licensed to Pueblo. File No. BAPCT 880226K4, KPCS/SCC Form 314

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<sup>4</sup>(...continued)  
providing public television service in wide areas. You have established that the University serves both the Pueblo and Colorado Springs areas and that it is therefore important that your television station do so as well." February 28, 1992 letter from Barbara A. Kreisman to Thomas Aube at 2.

Application, February 26, 1988. KKTU opposed that application. KKTU Petition to Deny, filed April 8, 1988. The Staff denied this application. tvUSA/Pueblo Ltd., 4 FCC Rcd 598, 65 RR2d 1550 (M.M.B. 1989). The Commission affirmed that denial. tvUSA/Pueblo Ltd., 5 FCC Rcd 7457, 68 RR2d 1086 (1990).

31. Now SCC is back with a new scheme, which once again involves a waiver of Commission rules and which again is designed to improve its coverage of Colorado Springs. This time SCC is trying to take advantage of a public interest determination made by the Commission on behalf of a noncommercial television station (KTSC(TV)) to gain a waiver of the minimum distance separation requirements for its commercial television station (KOAA-TV).

32. In the KPCS assignment of construction permit proceeding, SCC repeatedly described the alleged inadequacy of its signal coverage in Colorado Springs. tvUSA/Pueblo Ltd., 65 RR2d at 1550. In its quest for waiver of the Commission's minimum distance separation requirements, USC has stated that the signal coverages of KOAA-TV and KTSC(TV) from their Baculite Mesa sites suffer from the same shadowing problems in Colorado Springs. USC Amendment to Request for Waiver, a copy of which is attached hereto and made a part hereof as Exhibit C. Now USC proposes to abandon the signal improvement allowed by the construction permit and instead to continue to operate from what USC and KOAA-TV have both stated is an inadequate site on Baculite Mesa, with only a translator in Colorado Springs to make up for the allegedly inadequate antenna site.

33. This curious sequence of events strongly suggests that USC and SCC may have planned to enter into the channel swap at some time before USC applied for the construction permit and the waiver of the Commission's minimum distance separation requirements. Therefore the Commission was correct in refusing in the NPRM to allow SCC to circumvent the Commission's rules by using a noncommercial station as a "stalking horse" to obtain a waiver of the rules when that waiver will not be used by the noncommercial station.

c. The USC Construction Permit Should Not Be Extended

34. The NPRM notes that USC has filed an application for an extension of time within which to construct the unbuilt facilities of KTSC(TV) on Cheyenne Mountain. The NPRM correctly states that:

...pursuant to the terms of Section 73.3535(b) of the Commission's Rules, grant of such an extension request requires a showing that either construction is complete and testing is underway; or that substantial progress has been made in the construction of the station; or that reasons clearly beyond the permittee's control prevented construction and that all possible steps have, nevertheless, been taken to resolve the problem and to proceed with construction.

NPRM at ¶ 7, n. 4. In fact, KKTU has filed a petition for an order to show cause why the USC construction permit should not be revoked and a petition to deny USC's application for extension of the construction permit. Copies of KKTU's petitions and subsequent pleadings in support of the petitions are attached hereto as Exhibit D.

35. In reality, USC has done nothing more than attempt to use the pendency of the channel swap to justify its failure to start,

no less complete, the facilities authorized by the construction permit. The problem with this argument by USC is that it is contrary to the Commission's Rules and Commission explanations of those rules.

36. In 1985, the Commission promulgated stricter standards for the granting of extensions of construction permits. Construction of Broadcast Stations, 102 FCC2d 1054, 59 RR2d 595 (1985). For example, at that time, the Commission specifically deleted that portion of Section 73.3534 of the Rules that had permitted grants of extensions of construction permits upon a showing of "other matters," such as the pendency of an assignment application and the assignee's ability to quickly construct the station. Community Service Telecasters, Inc., 6 FCC Rcd 6026, 69 RR2d 1608, 1612 (1991).

37. The Commission has explained the effect of these stricter standards for the granting of construction permits as follows:

Specifically, before an extension application can be granted, a permittee must show either that substantial progress has been made in the construction of the station or that reasons clearly beyond its control have prevented construction and that all possible steps have, nevertheless, been taken to resolve the problem and to complete construction. See 47 CFR §73.3534(b). Similarly, if a permittee finds it necessary to file a modification application or an assignment/transfer application during the second half of the station's specified construction period, the permittee must show "substantial progress" or "reasons clearly beyond the control of the permittee." See 47 CFR §73.3535(b).

Id. 69 RR2d at 1610 n. 11.

38. In its application for extension of the construction permit, filed almost two years from the date of grant of the

construction permit, USC did not offer any explanation for its failure to even start to construct the facilities authorized by the construction permit, other than the proposed channel swap. This proposed channel swap was not disclosed to the Commission until over 18 months after the construction permit was granted and no explanation has been made by USC as to how the pendency of the proposed swap is a reason beyond USC's control which has prevented it from even starting construction of the facilities authorized by the construction permit.

39. USC clearly is in the same position as any other permittee which has failed to vigorously pursue construction and then seeks to use the proposed transfer of its construction permit as a justification for the extension of the construction permit. The Commission has repeatedly made it clear that it simply will not accept such an excuse as a justification for the extension of a construction permit. Construction of Broadcast Station, supra; Community Service Telecasters, Inc., 69 RR2d at 1612; Community Telecasters of Cleveland, Inc., 58 FCC2d 1296, 36 RR2d 1609 (1976).

40. USC's decision to defer construction must be viewed as merely a business judgment and not a situation beyond its control. The Commission's observation in the NPRM on this point is correct. NPRM at ¶ 7 n. 4. Therefore, in the final analysis, USC has failed to make any showing that it is entitled to an extension of the construction permit pursuant to Section 73.3534(b) or Section 73.3535(b) of the Commission's Rules. As a result, the construction permit should not be extended and should not be considered in

this proceeding.

**2. The Commission Should Not Allow USC To Abandon Its Commitment To Provide Primary Service To Colorado Springs From The Site Authorized In The Construction Permit**

41. As the Commission correctly pointed out in the NPRM, USC was granted the construction permit to move its transmitting facilities to Cheyenne Mountain based upon the "...stated need to continue providing noncommercial educational television service to Colorado Springs without relying on a translator...." NPRM at ¶ 8. As the Commission noted in the NPRM, in 1990, USC filed a modification application, File No. BPET-900122KE, to change its transmitting site based on its alleged commitment to serve Colorado Springs. NPRM at ¶ 8.

42. In granting USC's application in 1991, the Commission also granted USC a waiver of Section 73.610(b) because the site on Cheyenne Mountain proposed by USC does not comply with the mileage separation requirements of that rule. The waiver permitted use of the Cheyenne Mountain site, which is short spaced by 8.8 kilometers (5.5 miles) to co-channel station KJCT(TV), Grand Junction, Colorado and short spaced 13 kilometers (8.2 miles) to a vacant co-channel allotment at Laramie, Wyoming. NPRM at ¶ 5.

43. In the NPRM, the Commission examined this situation and observed that, if the channel swap were approved, KTSC(TV) would experience shadowing in Colorado Springs and USC proposes to use a translator to provide service to viewers in the shadowed area of Colorado Springs. NPRM at ¶ 8. In response to this proposal, the Commission stated, "...we do not believe it is generally desirable

to replace primary service to [the Colorado Springs] community, as contemplated in connection with USC's waiver request, with secondary service which could ultimately be forfeited to a full service television operation." NPRM at ¶ 8.

44. The Commission's analysis on this point is clearly correct. The public interest will not be served by allowing USC to abandon the representations it made in its modification application. USC's modification application was granted based upon a clear and permanent public interest benefit -- anticipated primary noncommercial television service to be provided to the people of Colorado Springs. In granting the modification application, the Commission was clearly weighing this anticipated benefit against the possible harm to its equally important station spacing rule. The Commission only grants waivers of its station spacing rule when provided with a showing of another equally compelling public interest benefit. Caloosa Television Corp., 4 FCC Rcd 4762, 66 RR2d 1303 (1989). In the case of the USC modification application, the benefit asserted by USC was the provision of off-air primary noncommercial service to Colorado Springs. NPRM at ¶¶ 5, 8.

45. By proposing a channel exchange which completely repudiates its commitment to provide off-air primary noncommercial service to Colorado Springs, USC presents a Channel Swap Petition devoid of any meaningful public interest benefit to the people of Colorado Springs. Indeed, the Channel Swap Petition proposes to rob the people of Colorado Springs of the only clear permanent benefit USC promised them and the Commission in 1990, and the only



clear permanent benefit it could provide them now.

46. As the Commission pointed out in the NPRM, the translator service alternative for Colorado Springs proposed by USC is only a secondary service and can be forfeited to a full service station initiating service in the area. NPRM at ¶ 8. Such an impermanent proposal is too speculative and is inadequate to support the request for the permanent exchange of channels contemplated by the Channel Swap Petition. Thus, if the Commission does permit the extension of the USC construction permit, it should only do so on the express condition that USC, and not SCC, construct and operate its primary transmitting facilities at the Cheyenne Mountain site.

**3. The Alleged Potential Gain In Noncommercial Reception Service Is Too Speculative To Justify Grant Of The Proposed Channel Exchange**

47. The third concern expressed by the Commission was that a majority of the service gains proposed by USC are related to its proposed translator service expansion. As noted above with respect to the proposed translator service for Colorado Springs, translator service is a secondary service, and it can be forfeited if a full service station initiates operation in the translator area. NPRM at ¶¶ 8-9.

48. Looking at the facts before the Commission, the Commission's analysis is clearly correct. At the KOAA-TV/KTSC(TV) licensed site, USC asserts that KTSC(TV) would provide additional off-air primary noncommercial service to only 5,398 persons using the KOAA-TV facilities which it would receive in the channel exchange. NPRM at ¶ 9. Of these persons, only 2,906 would receive